NO. 48990-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT R. COMENOUT, SR. et al.,

Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Appellants Robert Comenout, Sr., Robert Comenout, Jr., Marlene Comenout and Lee Comenout, Sr. (collectively "the Comenouts") each pleaded guilty various offenses related to the unlicensed and cash only sale of contraband cigarettes at the Indian Country Store (hereafter "ICS") at 908 River Road, Puyallup, Washington. CP at 247-79. The pleas were all pursuant to negotiation and agreement of the parties, and each of the Comenouts received dismissal of a majority of the charges and first time offender waivers if eligible, or in the case of Marlene Comenout, reduction of charges from felonies to gross misdemeanors. CP at 241-43, 247-79.

The parcel of land upon which ICS sits is Public Domain Allotment 130-1027, which is not on an Indian Reservation, but is trust land owned by members of the extended Comenout family and others, including non-Indian, Martina Garrison. CP at 630-33. "Trust parcels or Indian allotments are lands belonging to individual Indians and either held in trust by the United States or subject to restrictions on alienation. Such lands may or may not be located within the boundaries of an established Indian reservation." *State v. Cooper,* 130 Wn.2d 770, 772 n. 1, 928 P.2d 406 (1996).

"This is not the first case concerning the mercenary activities on Public Domain Allotment 130-1027 ('the Allotment')." *Comenout v. Pierce*

Cty. Superior Court, No. 3:16-CV-05464-RJB, 2016 WL 4945304, at 1 (W.D. Wash. Sept. 16, 2016) (citing *Comenout v. Washington*, 722 F.2d 574 (9th Cir. 1983); *Matheson v. Kinnear*, 393 F. Supp. 1025 (W.D. Wash. 1974); *State v. Comenout*, 85 Wn. App 1099, 1997 WL 235496 (1997); *State v. Comenout*, 173 Wn.2d 235, 267 P.3d 355 (2011), *cert. denied*, *Comenout v. Washington*, 132 S. Ct. 2402, 182 L. Ed. 2d 2402 (2012); *Quinault Indian Nation v. Comenout*, No. C15-5586-BHS (W.D. Wash. 2015); *Quinault Indian Nation v. Comenout*, No. C10-5345-BHS, 2015 WL 1311438 (W.D. Wash. 2015); *Comenout v. Washington State Liquor Control Bd.*, No. 74842-4-I, 2016 WL 4184367, at 5 (Div. II 2016)).[1]

Rather, this case is the latest in a decades long effort by government and tribal entities to dissuade the Comenouts from evading cigarette tax laws and/or compacts. CP at 635. The most recent law enforcement searches of ICS were executed in 2008, 2012 and 2015. Each search resulted in the seizure of thousands of cartons of untaxed "contraband" cigarettes. CP at 199-200, 635-36. In 2008, the Pierce County Prosecutor's Office brought charges of (1) engaging in the business of purchasing, selling, consigning, or distributing cigarettes without a license; (2) unlawful

[1] The preceding citations, which include some unpublished decisions, are not cited as binding authority. Instead, the citations are offered to outline the lengthy history of criminal and civil litigation surrounding the sale of untaxed cigarettes at Indian Country Store.

possession or transportation of unstamped cigarettes; and (3) first degree theft. Appellant Robert Comenout Sr. and co-appellant Robert Comenout Jr. were defendants in that matter, and were represented by current counsel Robert Kovacevich, Randal Brown, and Aaron Lowe.

In the Pierce County case, counsel challenged state criminal jurisdiction at the 908 River Road property. While this jurisdictional issue was being reviewed by the appellate courts, the defendants continued to sell unlicensed and unstamped cigarettes at ICS. The Supreme Court eventually heard this issue and settled the jurisdictional question in 2011 in *State v. Comenout*, 173 Wn.2d 235 (2011). The Court concluded that "the Comenouts are not exempt from Washington's cigarette tax." *Comenout*, 173 Wn.2d at 240-41. Because RCW 82.24.110 and .500 criminalize the possession of unstamped cigarettes and the unlicensed sale of cigarettes, the Court found that the State of Washington had criminal jurisdiction to prosecute the Comenouts. The U.S. Supreme thereafter denied the defendants' Petition for Writ of Certiorari in 2012. The case was returned to Pierce County Superior Court, but was ultimately dismissed by the Pierce County Prosecutor in 2012 after evidence from the 2008 search was lost. CP at 560-561.

In September 2012, law enforcement again executed a search warrant at ICS, seizing 8,478 cartons of contraband cigarettes and over

$583,000 cash from inside the store. CP at 199, 635-36. Undeterred, ICS reopened and resumed the sale of contraband cigarettes in October 2012. CP at 636-38.

In April 2015, the Pierce County Prosecutor's Office granted concurrent investigative and prosecutorial jurisdiction to the Attorney General. CP at 616. In May 2015, state and federal law enforcement again executed a search warrant at ICS. CP at 199-200. Again, tens of thousands of contraband cigarettes and large amounts of cash were found at the store. *Id.* However, it appeared from the evidence that some individuals who were previously assisting with the operation of ICS stopped doing so after the 2012 search. Martina Garrison was one family member who appeared to have stopped participating in the operation after the search warrant. CP at 618. In May 2015, the Attorney General's Office filed criminal charges against the Comenouts, who were the ones continuing to operate the store after the Supreme Court jurisdictional ruling, and also after execution of the 2012 search warrant. The matter preceded to trial, but the parties reached a settlement just after a jury was empaneled. The aforementioned guilty pleas were entered and this appeal followed.

II. ISSUES PRESENTED:

1. **Should this court follow binding precedent and affirm the trial court's conclusion that the State had criminal jurisdiction in this case?**

2. **By pleading guilty, did the Comenouts waive their non-jurisdictional claims such as alleged selective prosecution and whether they are an "Indian tribal organization"?**

III. ARGUMENT

"No appeal is ordinarily permissible following a guilty plea because the plea constitutes a waiver of the right to appeal." *State v. Boyd*, 109 Wn. App. 244, 249, 34 P.3d 912, 914 (2001) (citing *Young v. Konz,* 88 Wn.2d 276, 283, 558 P.2d 791 (1977)); *State v. Majors,* 94 Wn.2d 354, 356, 616 P.2d 1237 (1980)). "[A] guilty plea forecloses appeal except for validity of the statute, sufficiency of the information, jurisdiction of the court, or circumstances surrounding the plea." *State v. Saylors,* 70 Wn.2d 7, 9, 422 P.2d 477 (1966). *State v. Cross*, 156 Wn.2d 580, 621, 132 P.3d 80, 99 (2006), *as corrected* (Apr. 13, 2006).

Here, the Comenouts do raise the issue of criminal jurisdiction, but also other various issues involving questions of fact. Brief of Appellants at 27-29, 38-43. Although the non-jurisdictional claims are addressed here for completeness, those issues should be rejected by this court as waived by the Comenouts.

A. It Is Settled That The State Has Criminal Jurisdiction Over The Comenouts' Indian Allotment Land

The primary issue presented by Appellants is whether the State of Washington has jurisdiction over members of Indian tribes who sell untaxed cigarettes without a license at a store that is located on trust allotment land outside the boundaries of an Indian reservation. Whether considered in terms of search warrants, arrest warrants or the filing of criminal charges, this is, quite literally, the exact same question settled by our State Supreme Court in 2012. *Comenout*, 173 Wn.2d at 236. In answering this question, our Supreme Court could not be clearer that "the Comenouts are not exempt from Washington's cigarette tax" and that at the location of the 908 River Road Indian Country Store "the possession of unstamped cigarettes and the unlicensed sale of cigarettes" under RCW 82.24 is unlawful. *Id.* at 240-41. The Court "conclude[d] that the State does possess jurisdiction in such cases" and that expressly held that any Comenout motion to dismiss based on a lack of state criminal jurisdiction must be denied. *Id.* at 236.

1. The 2012 *Comenout* Opinion is binding precedent.

The Comenouts provide no new binding authority to this Court that supports their claim that the 2012 *Comenout* decision does not continue to apply to ICS. Such authority must come from an overturning of the *Comenout* decision by our State Supreme Court or a reversal by the

U.S. Supreme Court. Indeed, unless reversed by the U.S. Supreme Court, the principles of *stare decisis* and federalism require that this court follow this binding State Supreme Court precedent. Accordingly, any related or even subsequent federal cases, which would normally be used as mere persuasive authority to this court, must be ignored by this court, since direct, binding authority already exists on this issue. Moreover, the U.S. Supreme Court has already denied the defendants' writ of certiorari for the *Comenout* decision, making any further review by the U.S. Supreme Court unlikely. *Comenout v. Washington*, 132 S. Ct. 2402, 182 L. Ed 2d 1023 (2012).

Our Supreme Court also resolved and settled any federal questions related to state criminal jurisdiction at ICS. The Court fully considered whether Congress enacted any laws that preempted state criminal jurisdiction at this property. The Court considered laws enacted by Congress in 1953 and 1963, and determined based on this review, that Washington State had full criminal jurisdiction "over all Indian country outside established reservations." *Comenout*, 173 Wn.2d 235 at 238-39. This state criminal jurisdiction includes the defendant's property since it is "Indian country" that is "outside the boundary of any reservation." *Id.* at 237. Absent a new Act of Congress or a reversal by the United States

Supreme Court, this holding is the law of this court, and any motion to dismiss on jurisdiction grounds must be rejected as a matter of settled law.[2]

2. The law has not materially changed since the Supreme Court's 2011 jurisdictional decision.

The Comenouts argue that the 2012 Ninth Circuit decision in *Confederated Tribes and Bands of the Yakima Nation v. Gregoire*, 658 F.3d 1087 (2012) relieved "Indian retailers" of the requirement to collect cigarette taxes. This argument misstates the *Yakima Nation* holding as doing away with an obligation to collect and pay tax. Appellants' Brief at 15. Rather, the court actually noted that "[w]hile it would be prudent for any Indian retailer to pass on and then collect the tax from consumers, the Act does not *require* it; rather that is an economic choice left to the Indian retailers." *Yakima Nation* at 1087.

Thus, *Yakima Nation* recognizes the requirement that cigarette taxes be paid but recognizes Indian retailers have options regarding which funds to use to pay the taxes owed. The court certainly did not give the Comenouts or other Indian retailers the ability to simply choose not to collect **or** pay cigarette taxes. *Yakima Nation* is inapposite.

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[2] Despite this clear binding authority the defendant continues to hope that this Court will reverse our State Supreme Court and relies on a range of lower-level federal cases that the Supreme Court either rejected, ignored, or which have no precedential value to this court.

3. The Comenouts' Allotment Land is not exempt from State criminal laws.

The Comenouts argue that Public Law 280 did not include "a delegation from Congress of the state taxation of Indians." Appellants' Brief at 24. While this statement is facially true, it reflects a misunderstanding of the laws applicable to the Comenouts' allotment land. The issue here is *criminal* jurisdiction, not taxation itself. Here, the Comenouts engaged in the off-reservation, unlawful and unlicensed sale of contraband cigarettes. This is against the law in Washington.

As previously discussed, our Supreme Court resolved and settled any federal questions related to state criminal jurisdiction regarding the Comenouts' allotment land. The Court did so in the context of Public Law 280, which "authorized Washington among a few other states to assume jurisdiction over Indian country 'by statute' without the consent of the tribe." *Comenout* at 238. The Court recognized that, in response, Washington did amend a preexisting statute to assert "full criminal jurisdiction, with a few exceptions not relevant to this case, over all Indian country outside established Indian reservations." *Id.*

Because the Comenouts' allotment is not within an established Indian reservation, and because it is a crime under Washington state law to possess contraband cigarettes or sell cigarettes without a license, the State

was properly allowed to pursue these criminal charges. The Comenouts' jurisdictional arguments are without merit.

B. The Comenouts' Non-jurisdictional Claims Were Waived Once They Entered Their Guilty Pleas

A defendant who enters a voluntary guilty plea waives his or her right to appeal most issues. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). This is true even if the defendant did not explicitly agree to waive the right to appeal. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). Issues that can be appealed typically include questions of law "such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made." *Id.*

The following issues raised by the Comenouts involve factual questions that differ from the type traditionally allowed after a guilty plea. Although they should be deemed waived, they are briefly addressed below.

1. There was no selective prosecution in this case.

The Comenouts argue that the State should have brought charges against others, including fellow family-member Martina Garrison. Martina Garrison allegedly was involved in the business up to the 2012 search warrant. The Comenouts infer that by not charging her, the State is committing an equal protection violation because Garrison is not Native

American. Appellants' Brief at 27-9. This claim should be denied. All defendants for whom there was evidence of involvement in the business after the 2012 search warrant were treated the same, and the Comenouts offer no evidence that uncharged persons continued to have a role in the operation of ICS after 2012.

A criminal prosecution is presumed to be undertaken in good faith. *United States v. Bennett*, 539 F.2d 45, 54 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S. Ct. 327, 50 L. Ed. 2d 293 (1976). Prosecutors may exercise broad discretion in the selection of offenses to *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984). The decision to prosecute includes consideration of the public interest involved, the strength of the State's case, deterrence value, the State's priorities, and the case's relationship to the State's general enforcement plan. *Wayte v. United States*, 470 U.S. 598, 607, 105 S. Ct. 1524, 1530, 84 L. Ed. 2d 547 (1985); *Judge*, 100 Wn.2d at 713. "[S]electivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 505, 7 L. Ed. 2d 446 (1962).

To succeed in an unconstitutional selective prosecution claim the defendant must show (1) disparate treatment, i.e., failure to prosecute those similarly situated, and (2) improper motivation for the prosecution. *Wayte*, 470 U.S. at 602-03, 105 S. Ct. at 1527-28. Improper motivation for

prosecution means a selection deliberately based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Judge*, 100 Wn.2d at 713.

The Comenouts cannot prove there was disparate treatment here. Many people were involved in the illegal operation of ICS over the years, but most stopped their involvement after the 2012 search of the property. There is no evidence that family-member Martina Garrison, who happens to not be Native American, continued involvement in the day-to-day operations after the 2012 search warrant. In addition, family-member Edwin Comenout, who happens to be Native American, was also not charged since there was little evidence of his involvement in day-to-day operations at the property after the 2012 search warrant.

Those four members of the Comenout family who were charged in this case each had sufficient evidence to show their continuing participation in the operation despite clarity of law through the 2011 *Comenout* Supreme Court decision, and actual notice of illegal activity shown through the execution of the 2012 search warrant. CP at 200-204. Each of the four charged Comenouts were identified through evidence recovered during the 2015 search as persons continuing to be heavily involved in the continuing illegal cigarette sales at ICS. They were each also present at ICS during business hours during the 2015 search. *Id.*

None of the Comenouts can show disparate treatment, because there was not a failure to prosecute any person similarly situated. Those who were similarly situated were charged, and those who were not similarly situated were not charged. Accordingly, for this reason alone the defendant's equal protection claim should be denied.

2. The Comenouts are not an Indian Tribal Organization as defined by RCW 82.24.010(6).

The Comenouts argue that the allotment land and/or ICS constitutes an "Indian tribal organization" as defined by RCW 82.24.010(6). If so, they claim, State laws would not apply to their cigarette sales. Appellants' brief at 38, 40-41. Once again, their argument fails upon consideration of the cited provisions in their entirety.

RCW 82.24.010(6) defines "Indian tribal organization," and such organizations are afforded varying degrees of cigarette tax relief later in the chapter. The complete definition is "a federally recognized Indian tribe, or tribal entity, and includes an Indian wholesaler or retailer that is owned by an Indian who is an enrolled tribal member **conducting business under tribal license or similar tribal approval within Indian country**. For purposes of this chapter "Indian country" is defined in the manner set forth in 18 U.S.C. § 1151." RCW 82.24.010(6) (emphasis added).

Assuming *arguendo* the Comenouts' federal statutory arguments are accepted and correctly designate their allotment as "Indian country," they still cannot meet the Indian tribal organization definition because they offer no evidence of ever being validly licensed or otherwise operating with any tribal approval. Moreover, even if there were some hypothetical evidence of such validity, it should have been presented to the trial court. Such factual disputes are precisely the kind waived by entry of a guilty plea. For these reasons, the Comenouts' claim should be denied.

3. This prosecution did not violate the Comenouts' equal protection rights.

Finally, the Comenouts allege that RCW Ch. 82.24 violates the Equal Protection Clause of the U.S. Constitution. Appellants' Brief at 27-29. This claim lacks merit. Specifically, the Comenouts argue that they should not have been prosecuted for selling unstamped cigarettes when "wholesalers and military bases [can] sell and transport unstamped cigarettes without notice" per RCW 82.24.250. *Id.* at 27. They argue, generally, that individuals on trust land are treated differently from the federal or tribal governments, who are free from State enforcement. But the Comenouts again confuse the nature of an equal protection claim, and offer no facts or relevant authority to support it.

While the United States Supreme Court has upheld taxes for on-reservation cigarette sales to non-Indians or nontribal Indians, it has specifically prohibited state taxes on cigarettes sold to federal instrumentalities, like military bases. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); *Hancock v. Train*, 426 U.S. 167, 178-79, 96 S. Ct. 2006, 48 L. Ed. 2d 555 (1976). Washington's tax scheme simply recognizes this prohibition. For these reasons, the Ninth Circuit has specifically rejected an identical equal protection argument made regarding the Washington state cigarette taxes. *See United States v. Baker*, 63 F.3d 1478, 1490–91 (9th Cir. 1995).

By statute, the taxes imposed by RCW 82.24 do not apply to the sale of cigarettes to "United States army, navy, air force, marine corps, or coast guard exchanges and commissaries and navy or coast guard ships' stores." RCW 82.24.290(1). Long before this statute was enacted, the United States Supreme Court held that states do not have the power to tax military post exchanges or other instrumentalities of the federal government. *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 486, 62 S. Ct. 1168, 86 L. Ed. 1161 (1942). In 1947, Congress codified that principle in what is known as the Buck Act, precluding state taxation of sales of tangible

personal property sold on military post exchanges or other instrumentalities of the United States. 4 U.S.C. § 107.

The Army and Air Force Exchange Service ("AAFES"), which is a joint command of the U.S. Army and U.S. Air Force and provides exchange and motion picture services, is defined by federal regulation as "an instrumentality of the United States." AAFES General Policies, Army Regulation 60-10/AFR 147-7, § 1-9(a) (1988). The AAFES also is "immune from direct State taxation and from State regulatory laws . . . ." *Id.* at § 1-9(b).[3] In addition, the Ninth Circuit has already held that it is not a violation of equal protection for Washington State to regulate Indian tribes, but not federal instrumentalities (military bases), with regard to cigarette taxes. *Baker*, 63 F.3d at 1491. Accordingly, as a matter of law, no equal protection violation or any similar claim can arise out of the State's compliance with federal law, which exempts military installations from state taxation. The Comenouts' claim should be denied.

[3] There is a key difference exists between the operations of retail smoke shops on Indian reservations and those of military exchanges. Only active, retired, and reserve members and their dependents have access to post exchanges under federal regulations. AAFES General Policies, Army Regulation 60-10/AFR 147-7, § 3-7 (1988). This limits the number and types of individuals who may purchase cigarettes tax free, unlike Indian reservation smoke shops, where the general public has access and can purchase cigarettes.

IV. CONCLUSION

The State has criminal jurisdiction over the Comenouts' allotment land, and was therefore properly allowed to pursue cigarette tax evasion charges pertaining to the unlawful sales at ICS. In addition, by pleading guilty, the Comenouts waived their remaining arguments on appeal. Thus, the Comenouts' appeal should be denied and their convictions should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of April, 2017.

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NO. 48990-2

WASHINGTON STATE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON Respondent, v. ROBERT R. COMENOUT, JR., et. al Appellant.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of April, 2017, at Seattle, Washington.

KELLY HADSELL

WASHINGTON STATE ATTORNEY GENERAL
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